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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Preemption of Local Zoning Regulation
of Satellite Earth Stations

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IB Docket No. 95-59
DA 91-577
45-DSS-MISC-93

To the Commission:

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REPLY COMMENTS OF MICHIGAN
AND TEXAS COMMUNITIES

City of Detroit, City of Allegan, City of Belding, City of Buchanan, City of Cadillac, City of Cedar Springs, City of Coldwater, City of East Grand Rapids, City of East Tawas, City of Escanaba, City of Fremont, City of Garden City, City of Grand Haven, City of Grandville, City of Hudsonville, City of Kentwood, City of Livonia, City of Lowell, City of Marquette, City of Milan, City of Niles, City of Otsego, City of Rockford, City of Saline, City of Tawas City, City of Walker, City of Wyoming, City of Zeeland, Alabaster Township, Alpine Charter Township, Au Sable Charter Township, Baldwin Township, Benton Charter Township, Byron Township, Coldwater Township, Gaines Charter Township, Georgetown Charter Township, Grand Rapids Charter Township, Harrison Charter Township, Oscoda Township, Plainfield Charter Township, Sheridan Charter Township, Tilden Township, Van Buren Charter Township, Whitewater Township, Yankee Springs Township, Zeeland Township, Village of Chelsea, Village of Dexter and the City of Arlington, Texas (collectively "Michigan and Texas Communities").

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August 14, 1995

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To the Commission:

REPLY COMMENTS OF MICHIGAN
AND TEXAS COMMUNITIES

Forty-eight cities, townships, and villages in Michigan and the City of Arlington, Texas submit these reply comments in this rulemaking. These comments focus on four points -- the lack of any real problem; front yard setback requirements; building codes; and permit fees.

Lack of Problem: The comments submitted by various parties reflect, at best, anecdotal evidence of problems. The Commission's own 1994 report to Congress on the status of competition in the market for the delivery of video programming (1994 Competition Report) shows that over 4 million large satellite receive dishes are in operation. 1994 Competition Report at Paragraph 73. Approximately one-half million DBS satellite dishes were shipped in the second half of 1994 (Id.) and according to trade publications, by mid-1995 approximately 1 million such dishes had been produced and sold.

When claimed problems are compared against the 4 million larger satellite dishes and the 5 million total satellite dishes in operation, the minuscule nature of the claimed "problem" which the Commission's Notice of Proposed Rulemaking purports to address is clear.

To put it bluntly, the Commission is being deluged by a self-serving industry only with reports of problem cases. These same entities are studiously not reporting to the Commission the 5 million dishes that have been installed without any significant problem.

When there is a 5 million unit installed base growing by 1 million units per year, the reports to the Commission in this docket of local problems are overstated. And the national "one size fits all" solution proposed by the Commission is thus inappropriate.

Front Yard Setback Requirements: Of major concern to Michigan and Texas Communities is the Commission's proposal to allow satellite dishes in front yards despite setback requirements and despite the deaths and property damage that will result. This is particularly the case given the fact that some of the comments in this docket are misleading about the difference between prohibiting satellite dishes altogether in front yards and a setback requirement.

To put it simply, a standard element of many zoning ordinances is a "setback" requirement which generally prohibits construction within "x" feet of a property line. For example, a zoning ordinance might have a 30 foot setback requirement for front yards and 10 foot setback requirement for side yards. The size of the setback requirement varies with the community and with the area in question within a community. For example, an area with one-quarter acre lots will typically have much smaller setback requirements than an area with two acre lots.

The key for this Commission's purposes is that construction within the front yard setback requirement will lead to deaths and property damage. This is because front yard setback requirements are imposed in significant part for conventional traffic safety reasons:

Structures in front yards are prohibited within "x" feet of a roadway or sidewalk in part so that drivers can have a clear view of children running into the street and of cars backing out of driveways. Correspondingly, people walking down driveways and cars leaving driveways can see oncoming traffic and avoid accidents.

This conventional traffic safety reason for front yard setback requirements is obvious. Preempting such requirements will likely lead to thousands of accidents -- and probably hundreds of deaths -- per year. What is startling is this Commission's failure to even acknowledge -- much less comment on -- these issues. It is disturbing that the Commission would propose to preempt such requirements without any discussion of these safety issues.

Fortunately, Congress has resolved this matter by taking it out of the Commission's hands. Because the Commission may only act "for the purpose of promoting the safety of life and property" (Section 1 of the Communications Act of 1934), Congress has made the legislative decision that the safety of life and property is more important than any claimed federal interest in receiving satellite signals. This makes sense -- dead people don't watch television. To comply with the statute, the Commission's rule must be changed so that it in no way preempts front yard setback requirements. Otherwise the rule will violate the clear directive from Congress contained in the Communications Act.

In addition, satellite dishes in front yards -- in particular in that portion encompassed within a front yard setback requirement -- are those that are most likely to harm neighbors' property values and encourage urban blight. This is particularly the case given that the Commission's proposed rule would allow an unlimited number of satellite dishes in people's

front yards with no constraints on their color (red, blue, green and yellow poka-dot) and no requirement that such dishes actually be used.

As to property values, people's homes are their single biggest investment. Survey after survey and study after study reaffirms that for most Americans, their house is their principal financial asset. This is reflected in such celebrations as "mortgage burning" (a party to burn the mortgage when the last payment has been made) and by the strong reaction by residents nationwide to prevent actions that would hurt property values. Residents' fears are well placed -- a decline in property values can start a downward spiral which impacts not only the specific inhabitants of the area but also the community as a whole with urban blight, decay or worse. The unfortunate examples of this nation's inner cities are graphic testimony to what can occur.

Satellite dishes located in people's front yards are most likely to hurt property values. Those located in back yards (and to a lesser degree side yards) are much less likely to create these problems.

Thus, for both safety and property value reasons, Michigan and Texas Communities stress that this Commission's rule should not apply to front yards. And the communities respectfully note that this will not prohibit all such dishes in front yards -- some communities might allow them there, others would do so by variances. However, due to the impact of front yard satellite dishes on safety and property values, as described above, the Commission's rule cannot and should not apply there.

Building Codes Should Not Be Preempted: Building codes are adopted by municipalities solely to protect life and property. The Commission cannot preempt building codes and still comply with the Communications Act which (as noted above) dictates that the Commission can only act "for the purpose of promoting the safety of life and property." Communications Act of 1934, § 1 (emphasis supplied).

Building codes have been promulgated by municipalities nationwide to prevent the loss of life and property damage that occurs when structures collapse or are otherwise unsafe. As of the time of these comments, dramatic evidence of the failure to abide by such codes comes from Korea which has experienced the collapse of many buildings, including a major department store, primarily due to the failure to comply with construction codes. In the latest Korean collapse, hundreds of people were killed, and survivors were being pulled from the wreckage as much as 16 days after the building collapsed.

To put it bluntly, the satellite industry would cheerfully sacrifice the lives of innocent citizens and damage property in order to sell a few more satellite dishes or to make a little more money by being able to put them up less expensively. The Commission should not -- and legally cannot -- create such a situation.

Specific evidence of the potential harm occurring from satellite dishes is set forth in two of the industry filings. Hughes Network Systems, Inc. in its comments states how its satellite dishes are so heavily "ballasted" with weights --so that they won't be blown over by the wind -- that in South Florida they withstood Hurricane Andrew! Comments of Hughes Network Systems, Inc., pages 3 and 4, and footnote 1.

First, this example graphically illustrates the harm that building codes are intended to prevent: The placement of heavy weights for satellite dishes at the wrong point in the structure creates a risk of structurally unsound conditions and (potentially) building collapse. This is particularly the case when the heavy weights from satellite dish ballasts are combined with other weights (such as rooftop air conditioning, elevator machinery) plus the episodic and to some degree unpredictable loadings that can occur from heavy accumulations of ice and snow or from violent wind storms. In some areas, earthquake loads must be factored in as well.

Building codes are specifically intended to prevent the accumulation of such factors from leading to structural damage or building collapse. This Commission legally cannot preempt these aspects of building codes due to the damage to life and property that will result.

Second, building codes are designed to provide a uniform standard of construction applicable to all companies to protect the public safety. Without these uniform standards, there is no assurance that a satellite dish antenna will be properly constructed and installed to avoid accidents and injuries.

Third, as noted above, satellite dishes can easily "catch the wind" and be blown over by a heavy wind storm.¹ A resulting safety concern with respect to roof-mounted satellite

¹ Hughes Network Systems specifically refers to this in its comments which describe how it has to use a computer program to calculate the thousands of pounds of weight necessary to put at the base of roof-mounted satellites to prevent their falling over. It notes that as an alternative, the satellite dish is clamped directly to a beam in the building. Comments of Hughes Network Systems at pages 3 and 4. Wind loading concerns were also raised by BOCA code officials in rejecting certain changes requested by the Satellite Broadcasting and Communications Association. Satellite Broadcasting and Communications

dishes which building codes can address (such as by requiring dishes to be fastened to structural members of a building) is that in a heavy windstorm they will be blown over or blown away. This may damage the structure of the building. More importantly, they can be blown over the edge of the building and fall onto people and property below. This potential harm to lives and property is obvious. The Commission need only consider what would happen if in a heavy wind storm, satellite dishes were falling from the rooftops onto the crowded streets and sidewalks surrounding the Commission's offices or onto similar sidewalks in New York, Chicago or elsewhere.

The failure of the Commission's preemption proposal to even consider -- let alone address -- the preceding situations shows how its proposal to preempt building codes is incorrect. What is also novel, to put it mildly, about the Commission's proposed rule is that rather than recognize and address the safety concerns addressed by building codes that it simply proposes to preempt such safety regulations altogether.

The key is that building codes are enacted solely to protect the safety of lives and property. Because the Commission can only enact rules that promote the safety of lives and property, the Commission is statutorily precluded from preempting building codes.

Permit Fees: The proposed rule could be read as invalidating lawful permit fees imposed by municipalities. Many comments suggest this. This result is neither desirable nor legal.

Permit fees are imposed by units of government simply to recover the costs of their regulations and processes. Such fees are imposed in most, if not all, of the fifty states. The

Association Comments at 44.

key to them however is that they are cost based so that applicants for permits "pay their way."

The exact analog of such permit fees are the various fees imposed by this Commission, such as on applications for radio licenses, fees imposed upon cable television companies, and even on satellite companies. The rationale is the same -- to apportion and recover the cost of the agency's operation from those whom it regulates.

The fees imposed on satellite dishes are identical to those imposed upon anyone remodeling or adding to a house -- building inspection fees, electric inspection fees, and other permit fees. The purpose is simple -- to make sure that the construction is done in compliance with applicable codes and law so as to protect the safety of lives and property.

The preceding leads to two obvious conclusions: First, because these fees are imposed uniformly as a means of helping protect lives and property the Commission cannot under its statutory authority preempt these fees. This is because to do so would hurt -- not help -- promote safety and protect property values.

Second, "charity begins at home" and if the Commission believes that permit fees are so harmful to a claimed Federal right to receive TV programming, it should start by eliminating all FCC fees relating to such programming. For example, it should eliminate the per-subscriber fee imposed on all cable companies to cover the cost of the Commission's regulation; and all FCC fees on satellite companies, telephone companies, and the like.

The same reasons that make the elimination of FCC fees anathema to this Commission are the reasons why it cannot and should not limit cost based permit fees

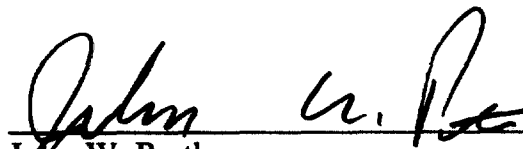
imposed by municipalities relating to the construction, electrical installation and related permits necessary for satellite dishes.

Respectfully submitted,

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